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Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE HINDU AMERICAN FOUNDATION AND OTHERS, REPRESENTING THE INTERESTS OF HINDUS, BUDDHISTS AND JAINS, AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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CASES

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Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995)	14, 19
County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573 (1989)	16, 17, 19
Edwards v. Aguillard, 482 U.S. 578 (1987)	16
Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001)	19
Lee v. Weisman, 505 U.S. 577 (1992)	19
Lemon v. Kurtzman, 403 U.S. 602 (1971)	16
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Marsh v. Chambers, 463 U.S. 783 (1983)	24-25
Reynolds v. United States, 98 U.S. 145 (1879)	6
Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)	17, 19
Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963)	23

Cited Authorities

Page

Stone v. Graham,
449 U.S. 39 (1980) 19

Van Orden v. Perry,
351 F.3d 173 (5th Cir. 2003) 15, 16, 20, 21, 22, 24

Van Orden v. Perry,
2002 U.S. Dist. LEXIS 26709
(W.D. Tex. Oct. 2, 2002) 4, 16, 22, 24

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 5

LEGISLATIVE MATERIALS

Immigration and Nationality Act of 1952,
ch. 477, 66 Stat. 163 (1952) 26

Immigration Act of 1917,
ch. 29, 39 Stat. 874 (1917) 26

BOOKS, ARTICLES & OTHER AUTHORITIES

2003 U.S. Census 7, 8, 27

Bochasanwasi Shri Akshar Purushottam
Swaminarayan Sanstha for Kids 9

Deuteronomy 6

Dundas, Paul,
The Jains (John Hinnells ed., 2d ed. 2002) 13

Cited Authorities

Page

Exodus 6, 21

Kapadia, Hiralal Rasikdas,
A History of The Canonical Literature of the Jainas
(Jitendra B. Shah ed., Shree Shwetambar Murtipujak Jaina Boarding (Ahmedabad), Series Vol. 17, 2000) 13

Kipling, Rudyard,
Mandalay, in Barrack-Room Ballads (1892) ... 4

International Religious Foundation,
World Scripture: A Comparative Anthology of Sacred Texts
(Andrew Wilson ed., 1991) 13, 25

Lopez, Jr., Donald S.
The Story of Buddhism (2001) 12

Melton, J. Gordon,
Encyclopedia of American Religions
(Jolen Marya Gedridge ed., 7th ed. 2003) 7, 12, 26

Schumann, H. Wolfgang,
Buddhism, An Outline of its Teachings and Schools
(George Fenerstein trans., 1973) 11, 18

Seager, Richard H.,
Buddhism in America (1999) 11

Cited Authorities

Page

Subramuniyaswami, Satguru Sivaya,
Dancing With Siva: Hinduism's Contemporary Catechism (5th ed. 1999) 8, 18

The Brhadaranyaka Upanishad
(Sankaracarya cmt., Swami Madhavananda trans., 1975) 10

The Encyclopedia of Religion
(Mircea Eliade ed., 1987) 11

The Harvard Pluralism Project:
World Religions in America at Harvard University 8, 11, 12, 13, 27

The Holy Geeta
(Swami Chinmayananda cmt., trans., n.d.) 9, 10

The Oxford Dictionary of World Religions,
(John Bowker ed., 1997) 7, 13

The Staff of the Nanzan Institute,
Buddhist Spirituality: Indian, Southeast Asian, Tibetan and Early Chinese
(Takeuchi Yoshinori et al. eds., 1994) 11

The World Almanac and Book of Facts 2005
(William A. McGeveran, Jr. et al. eds., 2005) .. 10, 11, 12

Thurman, Robert A.F.,
Essential Tibetan Buddhism (1995) 11

Cited Authorities

Page

Tweed, Thomas A. & Prothero, Stephen
Asian Religions in America: A Documentary History (1999) 27

Wakin, Daniel J.,
Rabbis' Rules and Indian Wigs Stir Crisis in Orthodox Brooklyn,
N.Y. Times, May 14, 2004 10

INTEREST OF THE *AMICI CURIAE*[1]

The issue before this Court has particular significance for individuals and groups whose faiths do not embrace the covenantal relationship between God and human beings established by the Ten Commandments as depicted on the monument on the grounds of the Texas Capitol.[2] The *Amici Curiae* represented herein submit this brief to offer the perspective of adherents to several non-Judeo-Christian faiths, and to explain why, from that perspective, the Ten Commandments Monument on the grounds of the Texas Capitol has the effect of expressing an inherent government preference for Judeo-Christian religions over non-Judeo-Christian religions.

Amici include non-profit organizations and worship communities in Hindu,[3] Jain,[4] Buddhist[5] and other non-Judeo-Christian traditions[6] (collectively, the "Non-Judeo-Christian Religions"). Collectively, they reflect the religious sentiments of millions of Americans, including some of the fastest growing religious groups in the United States.

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1. Consent from Respondent for the filing of this brief is being filed contemporaneously herewith. Consent from Petitioner is already on file with the Court. Pursuant to Supreme Court Rule 37.6, *Amici* state that no part of this brief was authored by counsel for any party and further state that no person, other than *Amici*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief.

2. Hereinafter referred to as the "Ten Commendments Monument" or the "Monument."

3. The following *Amici* are devoted to Hinduism: The Hindu American Foundation; Arsha Vidya Pitham; Arya Samaj of Michigan; The Hindu International Council Against Defamation; Hindu University of America, Inc.; Navya Shastra; and Saiva Siddhanta Church.

4. *Amicus*, The Federation of Jain Associations in North America, is devoted to Jainism.

5. *Amicus*, Dr. Robert A.F. Thurman, is a world-renowned Buddhist scholar and Professor of Indo-Tibetan Studies at Columbia University.

6. *Amicus*, The Interfaith Freedom Foundation, represents Muslims, Sikhs, Hindus, Buddhists, Jews and other religious minorities.

Amici strive to promote the teachings of their respective faiths and to represent their religions in dealings with others. A listing of, and further information about, the *Amici* is provided in the Appendix. Each *Amicus* is well situated to assist the Court in understanding the viewpoint of non-Judeo-Christians. Each represents people whose theologies differ in profound respects from one or more of the Commandments and with the concept of "law" as divine injunction that the Decalogue reflects. Because their religious traditions are not Judeo-Christian, *Amici* provide a unique perspective — albeit one shared by millions of Americans — on the effect of the Ten Commandments monument on non-Judeo-Christians, and why it should be found to violate the Establishment Clause under this Court's First Amendment jurisprudence.

SUMMARY OF THE ARGUMENT

The maintenance of the Ten Commandments Monument on the grounds of the Texas State Capitol violates the Establishment Clause because the Monument is inherently religious, serves no historic purpose, and does not lose its religious character through juxtaposition with secular images. It depicts the Ten Commandments, a cornerstone of Judeo-Christian theology, in the traditional shape of the "Biblical Stones." Non-Judeo-Christians, including *Amici*, who do not adhere to the religious views that the Ten Commandments either state or symbolize cannot fail to perceive the placement of such a monument on the grounds of the Texas Capitol as an endorsement of Judeo-Christian beliefs over their own. The maintenance of the Monument therefore has the primary effect of advancing the Judeo-Christian beliefs to which a majority of Texans subscribe.

In reaching a contrary conclusion, the lower courts committed two principal errors. First, they concluded that the Ten Commandments Monument was "non-sectarian" simply because it favored no Judeo-Christian sect or denomination over any other. The courts below completely ignored the effect of the Ten Commandments Monument on non-Judeo-Christians,

whose beliefs regarding the nature of God and the relationship between man and God differ greatly from those enshrined in the Monument and for whom the Monument is clearly and unavoidably "sectarian." By ignoring the effect of the Monument on non-Judeo-Christians, they disregarded the requirements of this Court's Establishment Clause jurisprudence.

Second, the lower courts relied heavily on the forty years the Monument stood without challenge on the grounds of the Texas Capitol. The Establishment Clause is a bedrock constitutional limitation on the power of government and a violation of that limitation should not be countenanced simply because no one has complained for over forty years. Many of this Court's Establishment Clause decisions struck down state-sponsored religious practices — mandatory school prayer, for example — that had been observed far longer than forty years. Moreover, the inference drawn by the lower courts that the absence of complaint evidences the inoffensiveness of the Monument overlooks the historically tiny population of non-Judeo-Christians in Texas — a population that has reached significant numbers only in recent years. With the recent increase of religious diversity, in both Texas and the nation as a whole, comes a host of Establishment Clause issues that would never before have come to the fore. The Fifth Circuit's reliance on the historical absence of challenge during a period of much greater religious homogeneity effectively allowed majoritarianism to trump Establishment Clause requirements.

Amici respectfully submit that the lower courts reached the wrong conclusion here in part because they failed to properly consider the effect of the Ten Commandments Monument on those who do not adhere to Judeo-Christian religions. *Amici* urge this Court to rectify that mistake.

INTRODUCTION AND BACKGROUND

The District Court began its opinion with an 1892 quotation from Rudyard Kipling: "Ship me somewhere east of Suez, where the best is like the worst. Where there a'n't no

Ten Commandments, an' a man can raise a thirst."[7] The District Court failed to recognize that the world is smaller now, and there are many people in the Western District of Texas — and millions in the United States — for whom "there a'n't no Ten Commandments." The District Court also failed to recognize that allowing the Ten Commandments Monument to stand on the Texas Capitol grounds affects those people in ways that the majority, for whom the Ten Commandments are powerful (or at least inoffensive) symbols of religious faith, will never experience.

The District Court and the Fifth Circuit should have considered, under longstanding Establishment Clause jurisprudence, that many of these people would perceive the Ten Commandments Monument as endorsing a privileged or preferred status for Judeo-Christian religions over other religions, particularly in a State such as Texas, where a large majority of the population practice the Christian or Jewish faiths. The lower courts also should have considered that the Monument would convey to such religious minorities that, despite the promise of equal status under the laws of the United States and the State of Texas, they remain in fundamental ways political outsiders. *Amici* respectfully submit that the failure of the District Court and the Fifth Circuit to consider any perspective other than that of persons steeped in the tradition of the Ten Commandments was error, and urge this court not to make the same mistake.

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7. *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 U.S. Dist. LEXIS 26709, at *1 (W.D. Tex. Oct. 2, 2002) (quoting Rudyard Kipling, *Mandalay*, *in* Barrack-Room Ballads (1892)) [hereinafter "District Court Opinion"].

The Ten Commandments Constitute And Symbolize Fundamental Religious Precepts Concerning The Relationship Between Human Beings And The Judeo-Christian God — Precepts To Which Millions Of Americans Do Not Ascribe

Amici comprise organizations that represent adherents to major world religions: Hindus, Buddhists and Jains.[8] Each of these Non-Judeo-Christian Religions has the utmost respect for Judaism and Christianity and their ethical teachings. But these Non-Judeo-Christian Religions do not subscribe to traditional Judeo-Christian beliefs governing the nature of God and the relationship among human beings and God. A central symbol in the Judeo-Christian world for that relationship is the Ten Commandments. The display of this fundamental symbol of Judeo-Christian beliefs by the State of Texas in the form of a monument on the grounds of the Texas Capitol speaks to *Amici* and their fellow believers differently than it does to Christians and Jews for whom the symbolism of the Decalogue is both familiar and true.

To members of non-Judeo-Christian religions, the Ten Commandments do not merely recite non-controversial ethical maxims; several Commandments (e.g., the first, second and third) address the forms and objects of religious worship.[9]

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8. *Zelman v. Simmons-Harris*, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting) (major religions include, among others, Hinduism and Buddhism).

9. The relevant text of the Ten Commandments Monument at issue follows, with bracketed numbers added for ease of reference:

> [1] I AM the LORD thy God. Thou shalt have no other gods before me. Thou shalt not make to thyself any graven images. [2] Thou shalt not take the Name of the Lord thy God in vain. [3] Remember the Sabbath day, to keep it holy. [4] Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee. [5] Thou shalt not kill. [6] Thou shalt not commit adultery. [7] Thou shalt not steal. [8] Thou shalt not bear false witness against thy

(Cont'd)

Moreover, the Decalogue symbolizes a theology that is fundamentally at odds with the theology of the Non-Judeo-Christian Religions. The manner in which the Decalogue was provided to human beings, as described in the Bible,[10] reflects a particular view of the relationship between the divine and human beings. Law, under this view, is not the result of rational deliberation by human beings in furtherance of the public good, but rather the product of direct, divine command. The substance of the Ten Commandments, far from being universal, is expressly predicated on the existence of one very specific god, the Judeo-Christian God, and no other: "I AM the LORD thy God. Thou shalt have no other gods before me." The Ten Commandments symbolize a particular religious perspective, that of Judeo-Christians and not that of *Amici* or their co-religionists.

The fundamental precepts of the Non-Judeo-Christian Religions directly conflict with the Ten Commandments Monument and what it symbolizes. To *Amici*, placement of the six-foot-high, three-foot-wide Ten Commandments Monument at the center of political and legal power in the State of Texas — its Capitol — signifies state endorsement of and preference for Judeo-Christian religions followed by a majority of Texans over non-Judeo-Christian religions. Thus, the Ten Commandments Monument breached the "wall of separation between church and State" — precisely what the Establishment Clause was intended to protect against.[11]

(Cont'd)
neighbor. [9] Thou shalt not covet thy neighbor's house. [10] Thou shalt not covet thy neighbor's wife nor his manservant, nor his maid servant, nor his cattle, nor anything that is thy neighbors.

See Appendix C to the petition for Certiorari (photograph of the Monument).

10. The story of how human beings received the Covenant from God appears in *Exodus,* 19:1-34:35, and *Deuteronomy,* 5:1-33 & 9:7-10:11.

11. *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting (Cont'd)

Background On The Non-Judeo-Christian Religions And How Their Theologies Conflict With The Religious Precepts Set Forth On The Ten Commandments Monument[12]

The Non-Judeo-Christian Religions represented by *Amici* include some of the oldest and most widely practiced religions in the world. More than one billion people worldwide adhere to these religions. Millions of people in the United States practice these religions, which are among the fastest growing in the country.

Followers of the Non-Judeo-Christian Religions did not begin to arrive in this country in appreciable numbers until about 1975. They came to the United States, like many generations of immigrants before them, seeking religious and political liberty and better lives for themselves and their families. Recognizing their religious minority status, they nevertheless expected to find a nation in which the Constitution guaranteed that Government would not favor one religion over another. In the eyes of the Non-Judeo-Christian Religions, the Ten Commandments Monument is inconsistent with this Constitutional guarantee.

1. *Hinduism.* Hinduism dates as far back as 5000 B.C.E.[13] Worldwide, there are over 800 million Hindus.[14] There are an estimated 766,000 to 1,285,000 Hindus in the United States,[15]

(Cont'd)
with approval Thomas Jefferson, *Letter to the Danbury Baptist Association* (1802), *reprinted in Thomas Jefferson: Writings* at 510 (Merrill D. Peterson ed., 1984)).

12. A complete description of Hinduism, Buddhism and Jainism, and the many schools of thought of each of these religions that have emerged over their long histories, is beyond the scope of this brief.

13. J. Gordon Melton, *Encyclopedia of American Religions* 195 (Jolen Marya Gedridge ed., 7th ed. 2003).

14. *The Oxford Dictionary of World Religions* 430 (John Bowker ed., 1997).

15. Estimates of the number of Hindus in the United States vary greatly. 2003 U.S. Census, *at http://www.census.gov/prod/2004pubs/* (Cont'd)

more than triple the number in 1990.[16] The number of Hindu *mandirs* (places of worship) in the United States has grown accordingly, with as many as 700 *mandirs* in the United States, forty in Texas, and five in the Austin area alone.[17]

Several core aspects of Hindu theology directly conflict with the precepts set forth on the Ten Commandments Monument, and with the religious anthropology that the Decalogue symbolizes, with the result that a Hindu viewing the Ten Commandments Monument would perceive the state as preferring or endorsing Judeo-Christian beliefs at variance with his or her own.

Hinduism propounds a theology of panentheistic monotheism, recognizing that God can be called many names and may take many forms, and that the means or ways to

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03statab/pop.pdf, at Table 79 (last visited Dec. 12, 2004) (estimating 766,000 Hindus in the United States in 2001) (citing American Religious Identification Survey, *at http://www.gc.cuny.edu/studies/key_findings.htm*, at Exhibit 1 (2001) (last visited Dec.12, 2004) [hereinafter "ARIS"]); *see also* The Harvard Pluralism Project: World Religions in America at Harvard University, *at http://www.pluralism.org/resources/statistics/tradition.php#Hinduism* (last visited Dec. 12, 2004) (citing various sources estimating 1,032,000 to 1,285,000 Hindus in the United States as of 2000) [hereinafter "The Harvard Pluralism Project"]. *See also*, Satguru Sivaya Subramuniyaswami, *Dancing With Siva: Hinduism's Contemporary Catechism*, xxii-xxiii (5th ed. 1999) (estimating two million Hindus in the United States as of July 1997).

16. According to the Census, between 1990 and 2001 the number of Hindus grew from 227,000 to 766,000. 2003 U.S. Census, *at http://www.census.gov/prod/2004pubs/03statab/pop.pdf*, at Table 79 (last visited Dec. 12, 2004) (citing ARIS).

17. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.phm* (last visited Dec. 12, 2004). One *mandir* in the Austin area, Barasana Dham, has membership of over 1,000 families. *Id. at http://www.pluralism.org/research/profiles/display.php?profile=72430* (last visited Dec. 12, 2004).

salvation are many.[18] Hindu theology does not place proscriptions on how to pray, and each person may choose which form of God to pray to on his or her own path to self-realization. Moreover, Hindus do not conceive of God as a specific, single entity separate from other living things, in stark contrast to the portrayal of the God who delivered the Ten Commandments in *Exodus*. Rather, for Hindus, God is omnipresent (*anantam*) and within all living things.[19] Thus, Hindus cannot reconcile their non-dualistic teachings with the very First Commandment, which mandates the exclusion of all divine manifestations other than the Judeo-Christian God. For the same reason, the teachings of Hinduism cannot be squared with the reference to "the Lord thy God" in the Fourth Commandment.

Nor can Hindus accept the First Commandment's prohibition against "graven images." The use of *murtis* (sacred representations of God in any of God's various forms) is central to the practice of the religion for virtually all Hindus.[20] These consecrated images represent the presence of God and help devotees offer their devotion to God.[21]

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18. This concept is known in Sanskrit as *sama-darshinah*, or "equal vision." *The Holy Geeta*, 313-14, 5:18 (Swami Chinmayananda cmt., trans., n.d.) ("Sages look with an equal eye upon a BRAHMANA endowed with learning and humility, on a cow, on an elephant, and even a dog and an outcaste." Commentary stating in part, "Everywhere [God] realises the presence of the same Truth, whatever be the container."); *see also id.* at 230, 5:2 ("[I]n whatever way men approach Me, even so do I reward them; My path do men tread in all ways. . . .").

19. *Id.* at 230.

20. For example, Sri Pramukh Swami Maharaj of the Bochasanwasi Shri Ashar Purushottam Sanstha propounded prayers involving *murtis* as one of the defining aspects of Hinduism. *See* Bochasanwasi Shri Akshar Purushottam Swaminarayan Sanstha for Kids (BAPS), *at http://kids.swaminarayan.org/thingstoknow/nityapuja.htm* (last visited Dec. 12, 2004).

21. This is not to say that Hindus worship *murtis*. The idea that Hindus "worship idols" is a very common misconception. Hindus do not believe that the *murti* in a *mandir* or home is actually the Divine

(Cont'd)

Additionally, Hindu theology does not proscribe the time or manner of prayer to God.[22] Hinduism teaches that God, the one Supreme Being, is omnipotent (*sarva-shaktitva*) and need not rest. For example, Hindu philosophy holds that God created the universe with a single inhalation.[23] Hindus feel no compulsion to refrain from work or other activities on any particular holy day of the week. The concept of six days of creation and a seventh day for rest, the Sabbath, is absent from Hindu theology. The Third Commandment's directive on the Texas Monument to "[r]emember the Sabbath Day, to keep it holy" is alien to Hinduism.

2. *Buddhism.* Buddhism was established around 600 B.C.E. Over 372 million people practice some form of Buddhism worldwide.[24] Buddhism is rapidly expanding in the United

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Being itself. Hindus fully understand that the Divine itself is much greater than the physical image. The misconception that Hindus worship idols has been perpetuated for over 500 years, and continues to date. For example, in 2004, Orthodox Jewish Rabbis in New York and Israel forbade the use of Indian hair in wigs because of the misconception that Hindus worship idols. *See Daniel J. Wakin, Rabbis' Rules and Indian Wigs Stir Crisis in Orthodox Brooklyn*, N.Y. Times, May 14, 2004, *available at* http://www.nytimes.com.

22. *The Holy Geeta*, *supra*, at 449, 7:21 ("Whatsoever form any devotee desires to worship with faith — that (same) faith of his I make (firm and) unflinching." Commentary stating in part, ". . . the Common Truth that holds together the multiple universe of names and forms." "It is very well-known that, all men do not worship at the same altar.").

23. *The Brhadaranyaka Upanishad* 251, 2:4:10 (Sankaracarya cmt., Swami Madhavananda trans., 1975) (Commentary stating in part, "[i]t is the eternally composed and already existent Vedas that are manifested like a man's breath — without any thought or effort on [H]is part"); *The Holy Geeta*, *supra*, at 527-30, 9:7-9 (explaining that creation is a continuous and cyclical process, which takes no effort on the part of God).

24. *The World Almanac and Book of Facts 2005* 734 (William A. McGeveran, Jr. et al. eds., 2005) (providing figures for mid-2003) (citing *Encyclopedia Britannica Book of the Year 2004*).

States, with as many as 2.9 million Buddhists in North America[25] and over 2,000 Buddhist centers in the United States, including over 100 in Texas.[26]

Buddhism traces its roots to the spiritual quest of a young man named Siddhartha Gautama.[27] After an extended quest for enlightenment, Siddharta experienced a spiritual revelation and was transformed into the "Buddha," which means "the enlightened one." As described by *Amicus*, Dr. Robert A.F. Thurman, one of the world's foremost Buddhist scholars, the Buddha's enlightenment did not have to do with God. Rather: "The Buddha's enlightenment was . . . a human being's direct, exact and comprehensive experience of the final nature and total structure of reality."[28] This attainment of understanding and experience of the ultimate truth, or enlightenment, is the goal of all Buddhists.[29]

The fact that Siddhartha, a human being, achieved "enlightenment" and became the Buddha on his own — without the intervention of or direction from God — is foundational for every form of Buddhism.[30] "Unlike the religions of Middle Eastern origin the idea of an almighty god does not play a role in Buddhism."[31] The conception of God, or the notion of

25. The Harvard Pluralism Project *at http://www.pluralism.org/resources/statistics/tradition.php#Buddhism* (last visited Dec. 12, 2004) (citing various sources); *The World Almanac and Book of Facts 2005*, *supra*, at 731 (providing figures for mid-2003) (citing *Encyclopedia Britannica Book of the Year 2004*).

26. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.php* (last visited Dec. 12, 2004).

27. Richard H. Seager, *Buddhism in America* 12-13 (1999).

28. Robert A.F. Thurman, *Essential Tibetan Buddhism* 9 (1995).

29. The Staff of the Nanzan Institute, *Buddhist Spirituality: Indian, Southeast Asian, Tibetan, and Early Chinese* xiii (Takeuchi Yoshinori et al. eds., 1994).

30. *See* H. Wolfgang Schumann, *Buddhism: An Outline of its Teachings and Schools*, 169 (George Fenerstein trans., 1973); *see also* 2 *The Encyclopedia of Religion* 337 (Mircea Eliade ed., 1987).

31. *Schumann*, *supra*, at 169.

worshipping creator gods, is considered an *obstacle* to the enlightenment sought by Buddhists.[32]

Thus, Buddhists do not accept the basic premise of the Ten Commandments, i.e., that a separate divine entity has handed down Commandments as a king might set rules for his subjects. The notion of "law" as the result of God's command to human beings, as symbolized by the Decalogue, is completely alien to Buddhism. Nor do Buddhists accept that such a divine entity ordained either the right relationship between human beings and God (Commandments 1-3) or among human beings (Commandments 4-10). This highlights why a Buddhist viewing the Ten Commandments Monument would perceive the state as preferring or endorsing Judeo-Christian beliefs.

3. *Jainism.* Jainism has been recognized as a distinct religion for over 2500 years.[33] There are an estimated 4.4 million Jains worldwide[34] with approximately 75,000 in the United States.[35] The number of Jain temples throughout the country is growing quickly.[36] Texas has five Jain centers or temples[37] and

32. Donald S. Lopez, Jr., *The Story of Buddhism* 34 (2001) (the Buddha warned his disciples that contemplating "God" or "a creator" would lead them into "a jungle, a wilderness, a puppet-show, a writing and a fetter, coupled with misery, ruin, despair, and agony").

33. Melton, *supra*, at 199.

34. *The World Almanac and Book of Facts 2005*, *supra*, at 734.

35. The Harvard Pluralism Project, *at http://www.pluralism.org/resources/statistics/tradition.php#Jainism* (last visited Dec. 12, 2004).

36. The Harvard Pluralism Project, *at http://www.pluralism.org/resources/statistics/tradition.php#Jainism* (last visited Dec. 12, 2004) (quoting Edwin S. Gaustad et al., *New Historical Atlas of Religion in America* 272 (2000), which states there were thirty-four Jain temples in the United States in 1987 and sixty by the mid-1990s). Currently, The Harvard Pluralism Project lists eighty-nine Jain temples throughout the United States. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.php* (last visited Dec. 12, 2004).

37. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.php* (last visited Dec. 12, 2004).

one of the larger Jain populations in the United States.[38]

The concept of *Ahimsa*, non-injury to all living beings, is the underlying philosophy of Jainism.[39] Jains thereby aspire to avoid all violence in "deed, in word, and in thought."[40] In Jainism, "God" is not a creator[41] but rather an enlightened teacher. This state of enlightenment is within each human being.[42] It is this aspect of Jainism that, like Buddhism, conflicts with the basic premise of the Ten Commandments, i.e., that God is a creator who has handed down Commandments defining relationships between humans and with God.

ARGUMENT

As demonstrated above, there are fundamental differences between the precepts set forth on the Ten Commandments Monument and Hindu, Buddhist and Jain teachings regarding the very essence of religion, i.e., the existence and/or nature of God and the relationship between human beings and God. To *Amici* and their co-religionists, the Ten Commandments Monument is not a list of universal ethical truisms or mere

38. The Harvard Pluralism Project, *at http://www.pluralism.org/resources/statistics/tradition.php#Jainism* (last visited Dec. 12, 2004) (quoting Edwin S. Gaustad et al., *New Historical Atlas of Religion in America* 272 (2000)).

39. *See* Int'l Religious Found., *World Scripture: A Comparative Anthology of Sacred Texts* 13 (Andrew Wilson ed., 1991).

40. *Id.*

41. *The Oxford Dictionary of World Religions*, *supra*, at 487; Hiralal Rasikdas Kapadia, *A History of The Canonical Literature of the Jainas* 1 (Jitendra B. Shah ed., Shree Shwetambar Murtipujak Jaina Boarding (Ahmedabad), Series Vol. 17, 2000) ("According to Jainism, the universe is uncreated and unending").

42. Int'l Religious Found., *supra*, at 13 ("[E]ach person has within himself or herself the potential to realize perfection and become a *Paramatman*, a soul freed from all karmic fetters and able to reach the highest point in the universe."); Paul Dundas, *The Jains* 110-11 (John Hinnells ed., 2d ed. 2002) (Jainism "accepts the existence of a divine principle, the [*P*]*aramatman*, often in fact referred to as 'God' . . . existing in a potential state within all beings").

"ceremonial deism;" it is not a history lesson; it cannot be dismissed as a *de minimis* affront to the Non-Judeo-Christian Religions. Instead, it expresses concepts that conflict with the most basic beliefs of these religions.

The presence of the Ten Commandments Monument is unlikely to make those steeped in Judeo-Christian culture feel like outsiders. But to those who do not accept the religious authority of the Ten Commandments or the religious anthropology that they symbolize, the Monument leaves the unmistakable and unsettling impression that Texas, as a political body, has endorsed a particular set of religious beliefs and observances — those embraced by the majority of Texans — as the officially preferred beliefs. The setting of the Monument inherently, inescapably, signals to the religious minority of those practicing non-Judeo-Christian religions, often recent immigrants, that they are not merely religious outsiders, but unwelcome strangers to the political community as well.[43]

I. The Primary Effect Of The Ten Commandments Monument On Members Of The Non-Judeo-Christian Religions Is To Confirm That Texas Endorses The Particular Majority Religious View Reflected In The Monument

The Establishment Clause undergirds our increasingly pluralistic society. Waves of immigrants — Christians of all denominations, Jews, Muslims, Hindus, Buddhists, Jains, Sikhs, Zoroastrians and others — have come to this country with the expectation that they will find the freedom to worship in their

43. The presence of the Ten Commandments in the symbolic and administrative heart of the Texas political community unmistakably conveys that the government of Texas endorses the listed beliefs. The grounds of the Texas Capitol are not, like the grounds surrounding the Ohio statehouse, a legislatively created public forum. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757 (1995). To the contrary, no monument can be displayed on the grounds of the Texas Capitol without explicit government approval and none of the other seventeen monuments on the grounds has anything but a secular message.

own way without becoming a political outsider as a consequence of doing so.

The Establishment Clause is phrased as an absolute: "Congress shall make no law respecting an establishment of religion. . . ." It admits no exceptions for majority sentiment, historical inertia or administrative expedience. It contains no sunset provision, limitations period or grandfather clause.

The Firth Circuit's ruling was in error. The Ten Commandments Monument violates the Establishment Clause under the facts of this case, i.e., placement in the Texas Capitol of a central symbol of Judeo-Christian beliefs, a religious symbol that by its nature, history and content reflects fundamental differences with *Amici's* non-Judeo-Christian theology. The Fifth Circuit declared the text on the Ten Commandments Monument to be "non-sectarian"[44] as the text did not favor one set of Judeo-Christian beliefs over another. But the text and the Monument plainly favor Judeo-Christian beliefs over other religious beliefs. For practitioners of non-Judeo-Christian faiths, the Ten Commandments Monument is manifestly sectarian. Its presence on the grounds of the Texas Capitol is perceived by reasonable non-Judeo-Christian observers as an inherently religious symbol that cannot be divorced from its overtly Judeo-Christian nature and history. The Fifth Circuit's ruling was error and should be reversed.

A. The Monument Runs Afoul Of The "Effect" Prong Of The Court's *Lemon* Test, Which The Lower Courts Misapplied By Focusing Solely On The Effect Of The Monument On Those Who Agreed With Its Teachings And Overt Religious Symbolism

The lower courts applied this Court's *Lemon* test to determine whether the Ten Commandments Monument violates the Establishment Clause. Under the *Lemon* test, the Court

44. *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) (describing the Monument as having "a large panel display[ing] a nonsectarian version of the text of the Commandments") [hereinafter "5th Cir. Opinion"].

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evaluates whether: (1) the challenged governmental activity has a secular purpose; (2) the activity's primary effect advances or inhibits religion; or (3) the activity fosters an excessive entanglement with religion.[45] A challenged activity that does not meet the standard for any one of these prongs violates the Establishment Clause.[46]

The parties stipulated that the Ten Commandments Monument did not violate the "entanglement" prong, leaving only the "purpose" and "effect" prongs to be evaluated. Here, we focus on the "effect" of the Ten Commandments Monument and the reasonable perception that it symbolizes state endorsement of the sectarian views expressed by it. The lower courts recognized that this Court has refined the effect prong, interpreting the First Amendment to prohibit government action that has the purpose or effect of endorsing or disapproving of religion.[47] A display endorses a religion when it "convey[s] or attempts[s] to convey a message that religion or a particular religious belief is favored or preferred."[48]

In analyzing the "effect" of government activity and whether a particular governmental action may be said to "endorse" a particular religious view, this Court has looked at the effect on a reasonable observer.[49] Most significant for this case, this Court has been careful to ensure that the reasonable observer include the views of both the believer and the non-believer, the majority and the minority.[50]

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45. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

46. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

47. District Court Opinion, 2002 U.S. Dist. LEXIS 26709, at *16; 5th Cir. Opinion, 351 F.3d at 178; *see County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 592-93 (1989).

48. *Allegheny*, 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

49. *Id.* at 599-600; *see id.* at 630-31 (O'Connor, J., concurring)

50. *See id.* at 597 (The question is whether the "challenged government action is sufficiently likely to be perceived by adherents of

(Cont'd)

In the case before the Court, *Amici* represent religious minorities in Texas and the nation. Only by taking into account the views of the faiths that *Amici* represent can the "reasonable observer" standard reflect, as it must, the full range of religious sensibility that the First Amendment protects from hostile government endorsement.[51]

That the religiously symbolic force of the Ten Commandments Monument may have been diluted to the point that it is acceptable in a vaguely non-denominational way to the Judeo-Christian majority in Texas does not matter because the religious diversity of Texas is far broader. If it did matter, then the Establishment Clause would be marginalized. It would permit the Judeo-Christian majority to establish some "least common denominator" of their religious beliefs over the non-Judeo-Christian minority. It is therefore critical that the reasonable observer standard include the views and sensibilities of those of faiths that lie outside the local majority.

The lower courts appear to have evaluated the message of the Ten Commandments Monument only from the perspective of those who agree with its general precepts. The Fifth Circuit described the Monument as containing a "non-sectarian" version of the Ten Commandments. This description only applies when the "reasonable observer" is deemed to belong to a Christian or Jewish "sect." To a non-Judeo-Christian believer, the Decalogue cannot fail to be the "sectarian" symbol of another, quite different, sect.[52]

(Cont'd)
the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices.") (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305-06 (2000) (holding that the First Amendment does not permit majority vote to neutralize message of state endorsement).

51. *Allegheny*, 492 U.S. at 597; *see Santa Fe*, 530 U.S. at 305-06.

52. Followers of the Non-Judeo-Christian Religions might have

(Cont'd)

The lower courts erred by failing to consider the perspective of *Amici*, for whom the Ten Commandments is not simply a set of "non-sectarian" platitudes, and who constitute an ever growing portion of the public. By only considering the perspectives of those to whom the Ten Commandments are a symbol familiar since childhood, the Fifth Circuit minimized the impact of that symbol on those for whom the Ten Commandments constitutes an alien set of largely religious directives.

Had the lower courts properly considered the perspectives of the significant and growing community of Hindus, Buddhists, Jains and other non-Judeo-Christian adherents, the outcome of the effect test would have been quite different. Consideration of the perspective of a non-Judeo-Christian observer, and the primary effect on such an observer, would lead to the inescapable conclusion that the Ten Commandments Monument endorses Judeo-Christian religious beliefs and precepts and has a primary effect of advancing Judeo-Christian religions and/or inhibiting non-Judeo-Christian religions.

B. The Effect Of The Ten Commandments Monument On Followers Of The Non-Judeo-Christian Religions Is To Signal An Endorsement Of Particular Religious Views

The effect of placing a six-foot monument of a central Judeo-Christian religious text at the seat of state government is to underscore the government's endorsement of the particular

(Cont'd)
perceived the monument differently were it surrounded by other examples of moral codes, such as the Buddhist Four Noble Truths and Eightfold Way To The Termination Of Suffering, which includes teachings on the attainment of enlightenment containing both secular and non-secular aspects, Schumann, *supra* at 65-68, and/or the Hindu Yamas and Niyamas, a code of conduct which includes ten restraints and ten religious practices to build character, the foundation for happiness and spiritual unfoldment, Satguru Sivaya Subramuniyaswami, *Dancing with Siva: Hinduism's Contemporary Catechism* 187-89 (5th ed. 1999).

views espoused by that text. This Court has permitted explicitly religious conduct or speech in governmental settings or at public events only when the context makes clear that the government is not endorsing the beliefs espoused in the speech. Thus, this Court permitted the display of a crèche in *Lynch* because the context demonstrated that the particular government display in question celebrated the secular, not religious, aspects of Christmas.[53] But, this Court struck down the display of a crèche in *Allegheny* because the display was simply religious without any significant secularizing influences.[54] Similarly, the Court permitted the display of a cross in *Capitol Square* because the location at issue was a "traditional public forum" and thus the reasonable observer would know that the government allowed private and unendorsed speech at that location, even though it was close to the seat of government.[55] By contrast, this Court struck down the display of the Ten Commandments in *Stone* because the context (displaying the Ten Commandments in public school classrooms) had the effect of state endorsement of the religious beliefs displayed.[56] Finally, this Court held that the Establishment Clause did not prevent a school from allowing a religious club to meet on school grounds after school because the school allowed many groups to use the grounds, thus not endorsing the religious message.[57] By the same token, the Court held constitutionally infirm a school practice of allowing "non-sectarian" prayers at both high school graduations[58] and football games[59] because the context of having a single perspective presented at such events conveyed a message of government endorsement. Like the conduct struck down in

53. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).
54. *Allegheny*, 492 U.S. at 598.
55. *Capitol Square*, 515 U.S. at 780-81.
56. *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam).
57. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001).
58. *Lee v. Weisman*, 505 U.S. 577, 594 (1992).
59. *Santa Fe*, 530 U.S. at 305.

Allegheny, *Stone*, *Lee* and *Santa Fe*, the display of the Ten Commandments at the Texas Capitol violates the Establishment Clause because as displayed, it has the effect of endorsing a religious message without secularizing influences.

The inference of government endorsement is particularly strong here because the Ten Commandments undoubtedly reflect the religious views of the majority of Texans. An adherent of a non-Judeo-Christian faith in Texas for any length of time cannot help but be aware of his or her status as part of a religious minority. Texas is part of the "Bible Belt." For the State of Texas to place on its Capitol grounds a monument to one of the central symbols of the religious majority, and have it be the only outdoor monument with explicitly religious symbols, is in itself powerfully suggestive of official endorsement.[60]

It is important to emphasize that *Amici* do not take issue with the specific ethical teachings of the Ten Commandments. *Amici* share with all people of good faith the belief that human beings should not kill each other, should not steal from each

60. *See* 5th Cir. Opinion, 351 F.3d at 175-76. The following additional factors bolster the endorsement effect of the Ten Commandments Monument on the Non-Judeo-Christian Religions: (1) the Monument is on the State Capitol grounds; (2) the Monument is owned and maintained by the state; (3) the Texas Capitol grounds are not a public forum; (4) there is no disclaimer of the explicitly religious message on the Monument; (5) the Monument is in the traditional shape and form of the Biblical Stones and contains numerous Judeo-Christian symbols such as the Chi Rho, Stars of David, the All-Seeing Eye in an equilateral triangle and ancient Hebrew text in tablets; (6) none of the other sixteen monuments on the grounds of the Texas Capitol are religious, and many, if not all, reflect government endorsed speech; and (7) as the District Court recognized, the context of the Monument does not suggest that it is part of a display regarding the history of lawmaking. In short, the context of the Monument does nothing to dispel its overwhelmingly religious impact, particularly when viewed by those outside of the Judeo-Christian context. In terms of context, the Ten Commandments Monument is similar to the stand-alone crèche this Court struck down in *Allegheny*, not the contextualized and secularized Christmas display that passed constitutional muster in *Lynch*.

other, and should honor their parents. The Ten Commandments Monument is not presented, however, as a mere set of universally shared ethical or legal norms. Nor is it presented as a lesson in history. Rather, it grounds the source of law in a specific religious tradition, the imposition of divine commandments described in *Exodus*. The Monument's message cannot be divorced by a reasonable viewer from its biblical origins and its religious symbolism and connotations. Such a monument unmistakably conveys the officially preferred status of the specific religious traditions that accept the *Exodus* story as holy writ.

The Ten Commandments are an important religious symbol, a symbol that conveys a religious message very different from the religious views of the followers of the Non-Judeo-Christian Religions. The effect of non-Judeo-Christians having to confront this religious symbol in the seat of government should have been part of the Fifth Circuit's reasonable observer analysis. Failure to consider these issues is reversible error and consideration of these issues compels a finding that the Monument violates the Establishment Clause.

C. The Placement And Religious Content Of The Ten Commandments Monument Informs Non-Judeo-Christians That They Are Political Outsiders

The Ten Commandments Monument is located adjacent to the Texas Capitol building on the State Capitol grounds. It is next to a public sidewalk and is on a "direct line between the legislative chambers, the executive office of the governor, and the Supreme Court building."[61] A reasonable observer walking by the Ten Commandments Monument would understand that the State permitted the Monument to be placed on the Capitol grounds and pays for its maintenance. Thus, a reasonable observer would perceive the State of Texas as endorsing the Monument, an undeniably religious display.

The Fifth Circuit suggests that the religious effect of the Ten Commandments Monument is diluted by an inscription

61. 5th Cir. Opinion, 351 F.3d at 181.

above the bench in the Supreme Court building, the Confederate Seal, the Mexican Flag and the Seal of Mexico, all found somewhere on the Texas Capitol grounds.[62] However, each of the items described by the Fifth Circuit is no more than ceremonial deism and has a direct relation to Texas. In contrast, the Ten Commandments Monument is unique. It is not ceremonial deism; it is not related to the history of Texas; and, as the District Court ruled, it did not form the basis of Texas law.[63]

Thus, the Ten Commandments Monument is the only monument[64] on the Texas Capitol grounds rooted in the history and beliefs of a specific religious tradition, and having no relation to the history of Texas. A non-Judeo-Christian, viewing the Ten Commandments Monument in this context, which includes its presence in a heavily Christian state, would understand that those who ascribe to the Ten Commandments are insiders, and those who do not are outsiders and disfavored members of the political community.[65] The primary effect of the Monument, taking into account the perspective of *Amici*, is to put the weight of the state behind an image underscoring the otherness of the *Amici*. The Fifth Circuit, by ignoring the perspective of non-Judeo-Christians, committed reversible error.

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62. *Id.* at 176, 180.

63. District Court Opinion, 2002 U.S. Dist. LEXIS 26709, at ** 15-16.

64. For a listing of the many artifacts on the Texas Capitol grounds, *see* 5th Cir. Opinion, 351 F.3d at 175-76.

65. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

II. The Ten Commandments Monument Violated The Establishment Clause Forty Years Ago And Continues To Do So Today

The Fifth Circuit's conclusions were based in significant part on the finding that the Ten Commandments Monument has stood on the grounds of the Texas Capitol for forty years without recorded complaint. This must mean, the Court reasoned, that reasonable observers do not view it as an endorsement of religious belief. This reasoning is fatally flawed.

Surely it cannot be the law of the land that those who would violate the Constitution need only do so in a way that their actions go unchallenged for an extended period of time. Such a rule would ensure that the most egregious constitutional violations could go unremedied. Moreover, such a rule ignores the specific historical reasons why the Ten Commandments Monument has not previously been challenged, at least by those represented by *Amici*.

Establishment Clause jurisprudence should not enshrine the historical views of the unchallenged majority, but should reflect the increasing and increasingly important religious diversity of the United States. As Justice Brennan stated:

> our religious composition makes us a vastly more diverse people than were our forefathers. . . . Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. In the face of such profound changes, practices which may have been objectionable to no one . . . may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.[66]

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66. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 240-41 (1963) (Brennan, J., concurring) (striking down a more than fifty year-old statute requiring opening exercises in public schools that included Bible readings) (internal footnote and citation omitted).

A. The Passage Of Time Does Not Legitimize An Otherwise Improper Government Activity

The Establishment Clause analyses of the lower courts gave weight to the presence of the Ten Commandments Monument at the Texas Capitol without legal challenge since 1961,[67] suggesting that the passage of time estops challenges to the Ten Commandments Monument. Such reasoning would create a dangerous First Amendment precedent. Could a government suppress free speech, for example, and then defend itself on the basis of the prolonged absence of the speech it had succeeded in suppressing? Should governments feel emboldened to install majority-sponsored religious displays in the hopes that they can avoid minority group complaints for just long enough to defeat them? Fundamental liberties such as those set forth in the First Amendment should not be deemed casually waived or subject to arbitrary limitations periods.[68]

Since its erection in 1961, the Ten Commandments Monument has been an improper endorsement by Texas of Judeo-Christian religions in violation of the Establishment Clause. The Ten Commandments themselves have not lost or changed their meaning, symbolism or impact since 1961.[69] There

67. 5th Cir. Opinion, 351 F.3d at 181-82 (the length of time the Monument has been in place "adds force to the contention that the legislature had a secular purpose"; the "reasonable observer would perceive an historic plaque as less of an endorsement of religion"); *see* District Court Opinion, 2002 U.S. Dist. LEXIS 26709, at *19 ("it is noteworthy that the monument was in place for more than forty years before any individual or organization complained about it").

68. Like discrimination in education and voting, the passage of time does not legitimize an otherwise unconstitutional government activity.

69. The circumstances here are far different than those in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Marsh* addressed prayers before legislative sessions, a practice with a "unique history" that is as old as the nation itself and which was engaged in by the Framers. *Id.* at 791. The Court took comfort that the practice was viewed by the Framers as (Cont'd)

is no basis for suggesting that State expression of the Ten Commandments is less an endorsement of religion now than previously. Indeed, given the increasingly pluralistic nature of Texas, like American society as a whole, the presence of the Ten Commandments is now *more* likely to be perceived as religious than before.[70]

That no individual or organization complained before Petitioner does not cure the ongoing Establishment Clause violation. In view of the history of the Non-Judeo-Christian Religions represented by *Amici*, it is not surprising that the followers of these religions had not openly complained.

B. The History Of *Amici* In Texas (And The United States) Explains Why Followers Of The Non-Judeo-Christian Religions Had Not Previously Openly Complained About The Ten Commandments Monument

The lower courts reasoned that if anyone had religious objections to the Ten Commandments Monument, someone would have raised them long before the instant action had been brought. This reasoning is flawed, however, because very few adherents of non-Judeo-Christian faiths were present in 1961 or for many years thereafter to voice any complaint. Texas cannot use its own historical lack of religious diversity to justify its

(Cont'd)
harmonizing religious views rather than supporting any particular one. Indeed, the process by which the chaplain in *Marsh* was selected and the prayers he delivered negated an intent by the Nebraska legislature to endorse a particular religion. Finally, the religious observance was brief and was addressed to a small group of adults who wielded state power, not to persons subjected to the exercise of state power, circumstances that mitigated the risk of religious indoctrination. These distinguishing factors are absent here, where the practice at issue is contemporary, comes with no explicit endorsement in words or deeds by the Framers, is overtly sectarian, is directed to the general public (including large numbers of visiting schoolchildren), not simply to the lawmakers themselves, and is on permanent display.

70. *See* Int'l Religious Found., *supra*, at 10.

continued sponsorship of the undeniably sectarian Ten Commandments Monument. The Fifth Circuit's reliance on the historical absence of debate elevates majoritarianism over Establishment Clause jurisprudence.

Until recently, the *Amici* were too small a minority in Texas to be expected to voice their objections to the Ten Commandments Monument. Hindus, Buddhists and Jains primarily immigrated to the United States from Asian countries after 1965.[71] Immigration from Asia was stunted during and after World War I because of a significant anti-Asian prejudice.[71] This bias led to the enactment of the Asian Exclusion Act of 1917,[72] which severely limited Asian immigration for a half century under a strict quota system. With the passage of the Immigration and Nationality Act of 1965, limitations on immigration to the United States were relaxed, and quotas from Asian countries were raised to the same level as European countries.[73] Nevertheless, it was some years before those immigrants could become citizens, further inhibiting their political voice. Accordingly, Hindu, Buddhist and Jain immigrants could not have been expected to openly challenge the Ten Commandments Monument in 1961.[74]

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71. Melton, *supra*, at 197-98.

72. Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917) (repealed 1952). The 1952 Act, although repealing the 1917 Asian Exclusion Act, retained the same restrictive quotas found in the 1917 Act. Immigration & Nationality Act of 1952, ch. 477, 66 Stat. 163 (1952) (amended 1965, 79 Stat. 911); *see also* Melton, *supra*, at 198.

73. Immigration & Nationality Act of 1952, ch. 477. 66 Stat. 163 (1952) (amended 1965, 79 Stat. 911); *see* Melton, *supra*, at 198.

74. The few non-Judeo-Christians who may have been present in Texas in 1961 may not have felt emboldened to challenge the Monument. Congress had not yet passed The Civil Rights Act of 1964 and the country would not see the first strong enforcement of civil rights laws for several years. The lower courts wrongly assumed that asserting an objection to the Monument in 1961 would have taken no more courage than it would today.

In recent years the number of Asian immigrants has been steadily rising and, not surprisingly, so has the number of followers of the *Amici's* religions. For example, according to the 2003 U.S. Census, the number of Hindus, Buddhists, and Jains in the United States approximately tripled from 648,000 in 1990 to 1,933,000 in 2001.[75] This trend is similar in Texas. For example, the first Hindu *mandir* in the nation was built in the late 1970s.[76] Today there are forty in Texas alone.[77] There are also currently over 100 Buddhist temples and five Jain temples in Texas.[78]

Finally, the Fifth Circuit's ruling is inconsistent with the history and purpose of the Establishment Clause. It was not lost on the Framers that the United States was created in large part by the emigrations of religious dissidents. The drafters of the Bill of Rights devised the Establishment Clause as a means of protecting the religious views of those who dissent or disagree by ensuring that state power would never throw its weight behind any religion or religion in general. As the population of the United States grows ever more religiously diverse, the original purpose of the Establishment Clause becomes ever more critical. The Ten Commandments Monument is sectarian and violates the Establishment Clause today, just as it did forty years ago. That it took forty years for religious pluralism to give rise to an

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75. 2003 U.S. Census, *at http://www.census.gov/prod/2004pubs/03statab/pop.pdf* at Table 79 (last visited Dec. 12, 2004) (finding that between 1990 and 2001, respectively, the number of Hindus grew from 227,000 to 766,000 and the number of Buddhists grew from 401,000 to 1,082,000); The Harvard Pluralism Project, *http://www.pluralism.org/resources/statistics/tradition.php#Jainism* (last visited Dec. 12, 2004) (the number of Jains grew from 20,000 to 75,000).

76. Thomas A. Tweed & Stephen Prothero, *Asian Religions in America: A Documentary History* 289 (1999).

77. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.php* (last visited Dec. 12, 2004).

78. *Id.*

impetus to challenge Texas' actions is no defense. This is especially true with regard to followers of the Non-Judeo-Christian Religions represented by *Amici*.

CONCLUSION

The Ten Commandments Monument is a large granite monument in the traditional shape of the Biblical Stones engraved with a message from the Judeo-Christian God and sitting on the path to the seat of political power in a predominantly Christian state. The lower courts erred by failing to consider the effect of this Monument on non-Judeo-Christians, such as the followers of the religions represented by *Amici*. As set forth above, the Ten Commandments Monument sends the message to such non-Judeo-Christians that the State of Texas endorses Judeo-Christian religions and that Judeo-Christians are insiders while all others are outsiders. *Amici* urge this Court to consider such effects and conclude that the Ten Commandments Monument violates the Establishment Clause of the First Amendment.

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APPENDIX

LISTING AND DESCRIPTION OF AMICI

Hindu Organizations

- **Hindu American Foundation (HAF):** HAF is a non-partisan, non-profit organization committed to providing a voice for nearly two million Hindu Americans. HAF interacts with and educates government, media, think tanks, academia and the public about Hinduism and issues of concern to Hindus locally and globally. Promoting the Hindu and American ideals of understanding, tolerance and pluralism, HAF firmly opposes hate, discrimination, defamation and terror.

- **Arsha Vidya Pitham:** Arsha Vidya Pitham is a non-profit church in California and Pennsylvania with approximately 12,000 members. Arsha Vidya Pitham is committed to making Hindu culture, religion, and religious disciplines available to all Hindus and non-Hindus, as well as facilitating the in-depth study of Sanskrit language, the language of Hindu religious text and the traditional study of classical Indian disciplines. Arsha Vidya Pitham strives to be a place where one learns the knowledge imparted by the *Rishis* (great sages).

- **Arya Samaj of Michigan:** Arya Samaj of Michigan is a non-profit organization with about 2,000 followers in Michigan. Arya Samaj of Michigan strives to promote Hinduism and to follow the principles of the Arya Samaj.

Appendix

- **The Hindu International Council Against Defamation (HICAD):** HICAD is a non-profit organization dedicated to eliminating bias against Indian traditions while promoting diversity, pluralism and tolerance.

- **Hindu University of America, Inc.:** The Hindu University of America is a non-profit organization whose purpose is to provide learning, research and training in a broad spectrum of topics related to Vedic/Hindu culture, including religion, philosophy, and practices.

- **Navya Shastra:** Navya Shastra is a United States-based non-profit organization dedicated to fostering the spiritual equality of all Hindus. Navya Shastra has members in ten countries, including the United States.

- **Saiva Siddhanta Church:** Saiva Siddhanta Church is a non-profit church with 1,000 members. The mission of the church is to protect, preserve and promote the Saivite Hindu religion. Saiva Siddhanta Church also publishes Hinduism Today, which has a circulation of over 250,000.

Appendix

Jain Organizations

- **The Federation of Jain Associations in North America (JAINA):** JAINA is a non-profit umbrella organization of over sixty-two local Jain Associations in the United States and Canada, and represents most of the Jains in the United States. Among JAINA's objectives are to promote religious and educational activities related to the Jain religion, to develop better understanding of the Jain religion, and to promote charitable and humanitarian activities in North America and around the world.

Other Organizations Or Individuals

- **The Interfaith Freedom Foundation:** The Interfaith Freedom Foundation is a non-profit organization devoted to defending the constitutional rights of Muslims, Sikhs, Hindus, Buddhists, Jews and other religious minorities, including their right to practice their respective religions.

- **Dr. Robert A.F. Thurman:** Dr. Thurman is a world-renowned scholar, Professor of Indo-Tibetan Studies at Columbia University, and is the Director of Tibet House in New York City. He is also a former Tibetan Buddhist monk and a close personal friend of His Holiness the 14th Dalai Lama. Dr. Thurman is also an author and has lectured all over the world on the subject of Buddhism.